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No. 80-1002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

-against-

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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PETITION FOR CERTIORARI FILED DECEMBER 15, 1980
PETITION FOR CERTIORARI GRANTED NOVEMBER 2, 1981

1979)

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in the case of a particular deaf child who suffers from no mental or emotional disability, a school board has complied with the Education of the Handicapped Act, which requires provision of a free appropriate public education, if the school board fails to provide that child with an educational opportunity equivalent to the educational opportunity provided to nonhandicapped children.

2. Whether, in a case in which administrative remedies have been exhausted for school year 1978-79, a court may grant injunctive relief extending beyond that school year when such relief is found to be appropriate.

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STATEMENT OF THE CASE

Clifford and Nancy Rowley are both deaf. Both are, nevertheless, college graduates and professionals. Clifford Rowley is a research chemist (J.A. 168); Nancy Rowley earned a masters degree in special education and is a certified teacher of the deaf (J.A. 321). They have two children: John, a former student in the Hendrick Hudson Central School District, and Amy, the infant respondent (plaintiff) in this action.

Amy is prelingually deaf.[1] Upon learning of her deafness, Mr. and Mrs.

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[1] Deafness is a severe handicap. 29 U.S.C. 706(12). See also, 121 Congressional Record S 19483, June 18, 1975 (remarks of Sen. Williams). Helen Keller said: "I am just as deaf as I am blind. The problems of deafness are deeper and more complex, if not more important, than those of blindness. Deafness is a much worse misfortune, for it means the loss

Rowley began training Amy in the use of total communication, the mode of communication used in their home, in order to promote her intellectual and emotional well-being despite her deafness (R.A. 24, J.A. 325, App. I).[2] Total communication

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of the most vital stimulus, the sound of the voice that brings language, sets thoughts astir, and keeps us in the intellectual company of man." Helen Keller in Scotland, A Personal Record Written by Herself. London: Methuen and Co. Ltd., 1933, page 68.

A deaf individual is pre-lingually deaf if he or she is born deaf or loses his or her hearing before the age of two. All other deaf individuals are termed post-lingually deaf.

[2] Citations to R., R.A., R.T., R.E., and App. are to the Record, Appendix submitted to the Court of Appeals, Transcript, Exhibits introduced in the District Court and separately compiled for the Court of Appeals, and the Appendix to this brief.

is a flexible system of communication involving a wide range of communication methods, including lipreading, speech development, amplification, sign language, fingerspelling, touching, and visual cues (J.A. 199-203, 309-311). In so proceeding, Mr. and Mrs. Rowley relied upon their personal knowledge and experience in confronting and surmounting the myriad problems of communication and isolation resulting from their deafness and relied too upon Mrs. Rowley's expert knowledge in the education of deaf children. [3]

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[3] Witnesses for both the petitioners and respondents have attested to the superb job Mr. and Mrs. Rowley have done in raising Amy (e.g., J.A. 222, 305-306, R.A. 193). Amy's parents, brother, relatives, and friends use total communication when communicating with her (App. I). Amy relies upon an interpreter in numerous settings, including shows, museums, church, Sunday school, and literary circle meetings (App. I).

The year before Amy was to enter kindergarten, the Rowleys notified the Hendrick Hudson Central School District ("HHCSD") that she would be entering school the following year; they asked HHCSD to place a sign language interpreter in Amy's classroom so that she could use total communication. Initially, HHCSD responded constructively. The principal of Amy's school and several teachers at that school enrolled in a beginner's sign language class to obtain a basic background in sign language.

During Amy's kindergarten year, HHCSD conducted a nine day trial with a sign language interpreter. The sign language interpreter reported that an interpreter was not needed in that specific kindergarten classroom (J.A. 52-56, 122-124).

When Amy began first grade, the Rowleys again asked HHCSD to place a

sign language interpreter in Amy's classroom. The HHCSD Committee on the Handicapped ("COH") rejected the Rowleys' request and all expert evidence they offered on the education of deaf children, terming such evidence "one-sided" (J.A. 320, R.T. 36-54). The COH relied, instead, upon the judgments of people who knew nothing about deafness and who had no experience in the education of deaf children (e.g., J.A. 45, 51) and the results of a hearing test that the COH did not use or understand (R.T. 55-59, Pl. Ex. No. 6, R.T. 55, 75). It provided Amy with services (teacher of the deaf for one hour a day and an FM Wireless hearing aid) that the Rowleys specifically objected to (e.g., J.A. 90, 130, R.T. 24, Plaintiffs' Post-Trial Argument, p. 4, Respondents' brief

to the court of appeals, p. 8.)[4]

The COH recommendation was incorporated into an individualized education program ["IEP"] for Amy drafted by Amy's teachers and the principal of her school. Mr. and Mrs. Rowley were not afforded an opportunity to provide input into the development of that program (J.A. 168-169). Inasmuch as the

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[4] The recommendation of the COH provides that:

1. Amy remain at the Furnace Woods School (her local school);
2. she be provided the services of a certified teacher of the deaf for one hour daily; and
3. she receives the services of a speech therapist three half-hour sessions weekly.

Pet. for Cert., App. F-15-16.

Not until the district court trial did the petitioners assert that the FM Wireless was part of the COH recommendation (R.T. 23), and at that time the respondents objected to that new addition to the COH recommendation (R.T. 24-25).

Rowlwys objected to the failure of Amy's IEP to include provision for a sign language interpreter and the inclusion, instead, of services they objected to, they requested an impartial hearing. [5] The hearing officer rendered an untimely decision affirming the decision of the school district (J.A. 59-64). Thereafter,

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[5] Under the program established by the petitioners, for five out of the six hours of each school day, Amy has an opportunity to understand no more than 59 percent of linguistic information. Only during the one hour a day when she is taught by a teacher of the deaf who uses total communication does she have an opportunity to understand 100 percent of linguistic information (J.A. 206). Indeed, under that program, Amy did not even know that she was still in school (R.T. 74-75).

Amy cannot process "linguistic information through hearing alone, with or without amplification." 34 CFR 300.5 (b)(1). The FM Wireless is a hearing aid; it is not a discrete sound amplification device. There is no such thing as a discrete sound amplification device. Like all hearing aids, it amplifies all sounds. Amy wears her own hearing aids,

the Rowleys petitioned the New York State Commissioner of Education to review the decision of the hearing officer. Following the Commissioners' untimely dismissal of their petition, the Rowley's initiated suit against HHCSD in Federal district court on April 24, 1979. The United States marshall served their summons and complaint on the school district on May 21, 1979. By order dated August 22, 1979, the District Court denied the petitioners' motions to dismiss and ordered the Commissioner of Education joined as a party defendant. (J.A. 163-164). Issue was joined on or after September 26, 1979.

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which were found to be the best hearing aids for her after extensive testing at the Thornberry Clinic, Gallaudet College, and the Speech and Hearing Clinic, West-Chester County Medical Center. Each day

The testimony in the district court and the administrative records received by the court (R.T. 225-228) showed that Amy is severely deaf. Under ideal conditions, relying upon lipreading and amplification only, she understands a maximum of 58-59 percent of oral communications (J.A. 184, R.E. 10). Those percentages were obtained in tests administered by Dr. Ann Barbara Kligerman, the Director of the Speech and Hearing Clinic at the Westchester County Medical Center, whose diction, as Judge Broderick saw, is perfect. If a communication is not a one-to-one conversation with a person who speaks very clearly and whose speech

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the school requires Amy to remove her own hearing aids and replace them with the FM Wireless. Amy's own hearing aids are superior to the FM Wireless (R.T. 115); she makes optimal use of those aids (R.T. 134).

pattern she is familiar with, in a familiar context, in perfect lighting (such as in the testing room in which she was tested), without any background noise (the testing room is sound-proofed), Amy's level of comprehension falls below 58-59 percent (J.A. 187-190). Thus, Amy comprehends no more than 50 percent of communications without the use of total communication (App. I); does not understand what is said in her classroom (J.A. 93-94); cannot follow her reading group (R.T. 75); fails to comprehend a great deal in discussions with her teachers (R.T. 76); misses communications from her teacher in their entirety when the teacher has her back to the class (J.A. 95, 107); misses comments made by other than the primary speaker in small

group discussions (J.A. 105); fails to comprehend communications in large or small groups when the speaker speaks rapidly (J.A. 107); understands little during special assemblies, movies, and field trips because of distance from the speaker, lighting, and other environmental factors (J. A. 107-108); misses oral directions (J.A. 114); and talks, but does not "listen" during group discussions (R.A. 175).

With the use of total communication, Amy has access to 100 percent of oral communications (J.A. 185, R.E. 10).

Amy's hearing is good in the very low frequencies, below the frequencies of human speech. She may be able to hear a dog bark or a car backfire and recognize it as

such. However, when you enter the range of frequencies of human speech, her hearing falls off precipitously, and eventually vanishes (J.A. 174-175). Amy cannot distinguish vowel sounds (R.E. 55-56). [6]

Mrs. Rowley works with Amy on her schoolwork on a daily basis (J. A. 167). Also, Amy receives substantial supportive assistance from her father, her brother, and other relatives (App. I).

Amy is a bright (R.A. 193), highly motivated (R.A. 173), eager, inquisitive (R.A. 189), special (J.A. 222, 306) child. Amy attained

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[6] That Amy can detect sound behind her is not much of a phenomenon. Dr. Kligerman testified that Amy can detect sound behind her (J.A. 175-176), although she cannot decipher that sound. Indeed, if Dr. Mulholland's testimony is to be believed, that a person who has no hearing at all is not deaf but merely masquerades as a deaf person (R.T. 381), then there does not exist a deaf person anywhere who is unable to detect sounds behind him.

above average scores on standardized achievement tests (R.E. 23-54).[7] The District Court attributed that performance to Amy's "superior intellectual and personal abilities" (Pet. for Cert., App. C-16, 483 F. Supp. 528, 536) and the "efforts . . . of her parents" (Pet. for Cert., App. C-14, 483 F. Supp. 528, 535).

The District Court determined that each handicapped child was entitled to an opportunity to understand oral communications in the classroom and that, therefore, the school district had to place a sign language interpreter in Amy's classroom "in order to bring her educational opportunity up to the level of the

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[7] Amy's highest score, for listening comprehension (R.E. 36), was attained when the material was presented to her using total communication (J.A. 249-250).

educational opportunity being offered to her non-handicapped peers." (Pet. for Cert., App. C-16, 483 F. Supp. 528, 535). [8] His independent decision, based upon the preponderance of the evidence, followed his considerations and assimilation of the administrative records and

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[8] Amy has had an interpreter since October 1980. Prior to that time, her interaction with her classmates was no more than superficial. See Pet. for Cert., App. C 19-20, note 5, 483 F. Supp. 528, 531, note 5. Now, other children are learning sign language so that they can communicate with Amy. Although Amy is deaf, she is a member of the Glee Club and has started learning to play the trumpet. In short, for the first time since she entered school, she is a real member of her class. See J.A. 203-204.

As a necessary concommitant of that order, Judge Broderick directed the petitioners to include provision for a sign language interpreter in Amy's IEP. the petitioners still have refused to comply with that directive.

additional evidence offered by both parties [9] and the credibility of the parties and witnesses. [10]

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[9] Mr. and Mrs. Rowley, Dr. Sternberg, and Mr. Denis are deaf and testified using total communication, which, per force, is visual in nature.

[10] For example, two days before the commencement of the trial, the petitioner Commissioner dispatched two of his employees (Dr. Norman Doctor and Mr. Edmund Cortez) to observe Amy for twenty minutes and then confirm his predetermined position (J.A. 235-236).

On the afternoon of September 28, 1979, the attorney for the Rowleys began examining Mr. Cortez on his certification (J.A. 244-245), knowing at that time that he was not certified as a teacher of the deaf by the New York Department of Education. Before he could answer, the trial was recessed until the following Thursday, October 4, 1979. At that time, Mr. Cortez testified that he had New York certification, having obtained it "just this past week." (J.A. 247-248).

clearly erroneous, but are adequately supported by the evidence . . . Moreover, the court weighed and evaluated the evidence with great care. In affirming the judgment of the district court, we are satisfied that the court meticulously applied precisely the standard prescribed by Congress." (Pet. for Cert., App. A-5, 7, 632 F.2d 945, 947, 948).

SUMMARY OF ARGUMENT

As a condition for the receipt of Federal funds under the Education of the Handicapped Act, New York State committed itself to providing each handicapped child within its borders with a free appropriate public education.

For purposes of this litigation, a free appropriate public education is an education that provides Amy Rowley with an equal educational opportunity, i.e., the same opportunity to benefit from whatever it is the Hendrick Hudson Central School District has to offer to every child enrolled therein, despite her deafness. It is an input standard; the school district is not required to guarantee her any particular level of achievement, only an opportunity to

achieve equivalent to the opportunity provided to other children. The school district is not required to provide Amy with any educational services, unrelated to compensation for her deafness, that are not provided to other children. For example, the school district is not obligated to offer her a course in algebra if such a course is not offered to other children.

New York agreed to establish procedural safeguards, as set forth in the Education of the Handicapped Act, to protect the rights of handicapped children and their parents, which safeguards culminate in judicial review of all matters related to the provision of a free appropriate public education to a handicapped child.

A determination of Amy's unique needs resulting from her deafness that must be taken into consideration in order to provide her with a free appropriate public education must be made on an individual basis. That determination involves consideration of such matters as her upbringing and her level of comprehension of oral communications. The District Court conducted a fact-finding hearing to determine the related service necessitated by Amy's unique needs resulting from her deafness. On the other hand, the petitioners provided Amy with the services they assumed to be the minimum they had to provide to any deaf child; services which both lower courts found to be inappropriate.

Cost to the Hendrick Hudson Central School District is not an issue in this

litigation, inasmuch as it was not raised below. The sole issue before this Court is this: Despite her deafness, is Amy entitled to the same opportunity as other children to make a success out of her life? The respondents say yes; the petitioners say no.

POINT I

A FREE APPROPRIATE EDUCATION IS AN EDUCATION THAT PROVIDES A HANDICAPPED CHILD WITH AN EDUCATIONAL OPPORTUNITY EQUIVALENT TO THE EDUCATIONAL OPPORTUNITY PROVIDED TO NON-HANDICAPPED CHILDREN.

A. Each recipient state must provide each handicapped child with a free appropriate public education.

As a condition for the receipt of funds under the Education of the Handicapped Act ("Act"), a state is required to provide each handicapped child within its borders with a free appropriate public education. ("FAPE"). 20 U.S.C. 1412(1) and (2)(B), 1413, 1414(a)(6). E.g., S. Rep. No. 94-168, pp. 3, 6, 8, and 16, reprinted in U.S. Code Congressional and Administrative News, 1975, pp. 1425, 1427, 1430, 1432, and 1440; H. Rep. No. 94-332, pp. 6, 16, and 29; S. Conf. Rep. No. 94-455, pp. 36-38, reprinted

in Cong. & Adm. News, 1975, pp. 1480, 1489-1491; S. Rep. No. 95-125, p. 3; H. Rep. No. 95-268, p. 4 (to accompany Public Law 95-49). [11] For recipients of funds under the Act, between November 29, 1975, the date of enactment of Public Law 94-142, the Education for all Handicapped Children Act of 1975 ("1975 Act"), and September 1, 1978, States were to plan how to establish and begin to implement a FAPE. After September 1, 1978, a FAPE "will be available" to each handicapped child. 20 U.S.C. 1412(2)(B).

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[11] The petitioners contend that recipient states do not agree to provide an appropriate education to handicapped children (brief, pp. 33, 34). That is a novel theory, not only not raised below, but diametrically opposed to the petitioners' argument below (e.g. J.A. 332; Commissioner's brief to the court of appeals, pp. 8, 17; HHCSD trial memorandum, p. 14). The petitioners have known all along the conditions for receipt of Federal monies under the Act.

Court action and State laws throughout the Nation have made clear that the right to education of handicapped children is a present right, one which is to be implemented immediately. The Committee believes that these State laws and court orders must be implemented and that the Congress of the United States has a responsibility to assure equal protection of the laws and thus to take action to assure that handicapped children throughout the United States have available to them appropriate educational services. The Committee believes that the provisions it has adopted in S. 6 reinforce this right to education, while still providing States and local educational agencies ample time to fulfill the full service goal.

S. Rep. No. 94-168, pp. 17-18, reprinted in Cong. & Adm. News, 1975, p. 1425, 1441.

. . . Though the truism that "justice knows no timetable" cannot be argued with, it is generally agreed that there should be a date beyond which no State or locality may be failing without penalty to guarantee the basic rights of handicapped children, and most especially, a guarantee against outright exclusion. Also, it is felt that the States ought to be given a reasonable -- but not lengthy -- time period in which to reach "full service." H.R. 7217 establishes a "date certain" of September [1], 1978.

H. Rep. No. 94-332, p. 15.

See also, 121 Congressional Record H 37024, November 18, 1975 (remarks of Rep. Brademas); 121 Congressional Record S 37413, November 19, 1975 (remarks of Sen. Williams).

Participation in this Federal-state grant program is voluntary. ". . . States are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of federal funding." Pennhurst State School & Hospital v. Halderman, U.S. , 101 S. Ct. 1531, 1536 (1981). See also, King v. Smith, 392 U.S. 309, 88 S. Ct. 2128 (1968); Lau v. Nichols, 414 U.S. 563, 94 S. Ct. 786 (1974). In the latter case, a school district was ordered to provide non-English-speaking children with educational services to overcome their language disabilities. "Whatever may be the limits of that power [to fix the terms on which Federal money allotments to the states will be disbursed], they have not been reached here." Id. at 569. In Lau

this Court dealt with administrative regulations. This case is much stronger, inasmuch as Congress specifically laid down the conditions for receipt of Federal moneys.

As noted (note 15, infra, and accompanying text), the New York State Constitution assures that each handicapped child will be provided with a free public education, including the services necessary for that education to be meaningful to the child. The Act establishes requirements as conditions for receipt of Federal monies that are 99 percent to 101 percent of the requirements imposed on the petitioners under the New York State Constitution. If New York State did not participate in the Federal program, the State and its political

subdivisions would have to fulfill obligations under the New York State Constitution that are virtually identical to the conditions established by the Act -- but without the assistance of the Federal monies.

B. A free appropriate public education is an education that provides a handicapped child with an equal educational opportunity.

The Act, as amended by the 1975 Act, defines FAPE. 20 U.S.C. 1401(18). [12] However, that is not a functional definition and, thus, it offers judges no guidance in their consideration of controversies involving "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education." 20 U.S.C. 1415(b)(1)(E). See Battle v. Pennsylvania, 629 F. 2d 269, 276, 279, 284 (concurring and dissenting) (Third Department, 1980); cert. denied sub nom., Scanlon v. Battle,

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[12] Reference to the IEP indicates Congress' intention that the term FAPE be particularlized for each handicapped child.

U.S. , 101 S. Ct. 3123 (June 22, 1981); Springdale School District v. Grace, 656 F.2d 300, 304 (Eighth Circuit, 1981). [13]

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[13] At the trial, the petitioners argued that the term FAPE ". . . as used in this statute [the Act] has not yet been construed by the Courts . . ." Trial memorandum of petitioner school district, page 16. The petitioners thereupon offered material to assist Judge Broderick in formulating a standard for FAPE. The standard formulated by Judge Broderick is the standard sought by the petitioners; their objection is not to the standard, but to its application to the facts herein. See Pet. for Cert., App. A-5, note 4, 632 F. 2d 945, 947.

The petitioners object to Judge Broderick's reference to the Regulations promulgated under section 504. While those Regulations are clearly relevant to the case herein, where, as here (id. at p. 18), a party relies upon a statute in a lower court, he may not later object to its application. See Hurley v. Commissioner of Fisheries, 257 U.S. 223, 225, 42 S. Ct. 83 (1921).

Even assuming, arguendo, that the definition in the Act provides a usable definition of FAPE, it is an accepted rule of construction that: "When aid to construction of the meaning of words, as used in a statute, is available, there certainly is no 'rule of law' which forbids its use however clear the words may appear on 'superficial examination.'" United States v. American Trucking Associations, 310 U.S. 534, 543-544, 60 S. Ct. 1059 (1940).

A good starting point is the definition of the word "appropriate." Webster defines "appropriate" as "specially suitable." [14]

The standard enunciated by Judge Broderick is bottomed in equal educational opportunity (". . . a standard . . . more in keeping . . . with the Equal Protection decisions which motivated the passage of the Act." Pet. for Cert., App. C-11; 583 F. Supp. 528, 534). The ruling of this Court in Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686 (1954), to the effect that a State that undertakes to provide an opportunity to obtain an education to children within its borders must provide that opportunity to all on

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[14] The petitioners argue, nevertheless, that they are only required to provide Amy with an "adequate" education (Pet. for Cert., Reply Brief, page 16). Adequate means barely satisfactory; it is neither synonymous with nor even

equal terms served as the legal underpinning of the 1975 Act. [15] Sen. Report No. 94-168, page 6, reprinted in Cong. and Adm. News, 1975, page 1425, 1430; 121 Congressional Record S 19485, June 18, 1975 (remarks of Sen. Williams); Stafford, The Education for All Handicapped Children Act of 1975, a Senator's Perspective, 3 Vermont Law Review, 71 (1978). At the time of passage of the 1975 Act, several

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close to being a synonym for appropriate. Absent a clear showing that Congress misspoke itself, the irrebutable presumption must be that Congress meant what it said.

[15] The New York Court of Appeals has held that Article 11, Section 1 of the New York State Constitution, wherein New York has undertaken to provide all children with the opportunity to a public education, assures that each handicapped child will be provided with a free public education, including the services necessary for that education to be meaningful to the child. Matter of Levy, 38 N.Y.2d 653, 657-58, 382 N.Y.S.2d 13 (1976). See also, New York Education Law, section 3201 et seq.; section 4401 et seq.

dozen Federal and State courts had determined, based upon the Brown ruling, that handicapped children are entitled to an equal educational opportunity. S. Rep. No. 94-168, pp. 5-6, 7, 22-23, reprinted in Cong. & Adm. News, 1975, pp. 1425, 1429-30, 1431, 1447-48; H. Rep. No. 94-332, pp. 3-4, 10; 121 Congressional Record S 19482, June 18, 1975 (remarks of Sen. Randolph), id. at 19485 (remarks of Sen. Williams), id. at 19503 (remarks of Sen. Cranston), id. at 19504 (remarks of Sen. Schweiker); 121 Congressional Record H 23703, 704, July 21, 1975 (remarks of Rep. Brademas), id. at 23706 (remarks of Rep. Quie); 121 Congressional Record H 37029, November 18, 1975 (remarks of Rep. Michel); 121 Congressional Record S 37411, November 19,

1975 (remarks of Sen. Stafford).[16]

By passage of the 1975 Act, Congress sought to fulfill its Constitutional mandate that all individuals, regardless of disability, be accorded equal protection of the laws. See 20 U.S.C. 1400 (b)(3 and 9); S. Rep. No. 94-168, pp. 9, 13, 17, reprinted in Cong. & Adm. News, 1975, pp. 1425, 1433, 1437, 1441; S. Conf. Rep. No. 94-455, pp. 28-29, reprinted in Cong. and Adm. News, 1975, pp. 1480, 1481-82; 121 Congressional Record S 19492, June 18, 1975 (remarks of Sen. Williams), id. at

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[16] The Act speaks of the provision of "full educational opportunity" to handicapped children. 20 U.S.C. 1412 (2)(A)(i) and 1414(a)(1)(C). See 121 Congressional Record S 19482, June 18, 1975 (remarks of Sen. Randolph); 121 Congressional Record H 23703, July 21, 1975 (remarks of Rep. Brademas); 121 Congressional Record H 37027, November 18, 1975 (remarks of Rep. Gude); 121 Congressional Record S 36418, November 19, 1975 (remarks of Sen. Biden).

19504 (remarks of Sen. Schweiker). [17]

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[17] At pages 64-65 of their brief, the petitioners set forth four excerpts from the Congressional debates preceding passage of the 1975 Act. The full statement of Senator Stafford shows that enactment of the 1975 Act "will finally bring to all the handicapped children of our Nation what has always been their right -- a free appropriate public education." 121 Congressional Record S 19482, June 18, 1975 (emphasis added). Senator Williams stated that "The time, I hope, has come when we look no longer upon persons with disabilities as charitable objects, unable to make significant contributions. Action on this legislation will establish a public policy that will break the chain of ignorance once and for all." Id. at 19492. Senator Randolph asserted that: "The Education for All Handicapped Children Act of 1975 promises handicapped children the educational opportunity that has long been considered the right of every other American child." 121 Congressional Record S 37410, November 19, 1975. Representative Harkin (who may be the only Congressman who can sign fluently) stated that a FAPE is a right of every handicapped child, not just children who are mentally retarded. The statement shows that he is especially interested in the educations provided to children who are deaf, because his brother is deaf. His strong support of the 1975 Act resulted from his desire to see that deaf children receive proper educations that take into account the unique needs resulting from their disabilities. 121 Congressional Record H 25541, July 29, 1975.

Insofar as this litigation is concerned, the goal of the Act is to provide each handicapped child with an equal educational opportunity. E.g. S. Rep. 94-168, p. 9, reprinted in Cong. and Adm. News, 1975, p. 1425, 1433; H. Rep. No. 94-332, p. 4; 121 Congressional Record S 19483, June 18, 1975 (remarks of Sen. Stafford), id. at 19505 (remarks of Sen. Beall); 121 Congressional Record H 23704, July 21, 1975 (remarks of Rep. Brademas), id. at 23706 (remarks of Rep. Quie); 121 Congressional Record H 37030, 31, November 18, 1975 (remarks of Rep. Mink); 121 Congressional Record S 37412, November 19, 1975 (remarks of Sen. Taft), id. at 37418, 19 (remarks of Sen. Cranston).

The petitioners concede that the goal of the Act is to provide handicapped children with equal educational oppor-

tunities. (E.g., J.A. 346, 350-351; petitioner HHCSD post trial brief, p. 24). They argue, however, that that goal has no relevance to the definition of the term FAPE (Pet. for Cert., reply brief, p. 3) and that, therefore, that conceded goal can somehow be attained by providing handicapped children with an education that does not measure up to the education provided to other children. As noted by Judge Newcomer, the definition of FAPE can only be determined by reference to the goals envisioned by Congress. Armstrong v. Kline, 476 F. Supp. 583, 603 (EDPa, 1979). ". . . [T]he goal is the main thing. There can be no wisdom in the choice of a path unless we know where it will lead." Cardozo, The Nature of the Judicial Process, page 102. See also,

Battle v. Pennsylvania, 629 F.2d 269, 284 (concurring and dissenting opinion of Judge Sloviter) (Third Circuit, 1980); cert. denied, sub nom. Scanlon v. Battle, June 22, 1981. [18]

In light of the fact that Judge Broderick's standard had been solicited by the petitioners (see note 13, supra) and in light of their acknowledgment that the goal of the Act is to provide handicapped children with equal educational opportunities, not unsurprisingly, the petitioners do not argue that the standard is wrong; instead, they argue that it is unworkable (J.A. 354). The respondents cannot imagine how or why; certainly, in Amy's case, a simpler standard to apply cannot be imagined. One must first start with two incontestable presumptions: (1) material presented in the classroom

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[18] The petitioners seemingly contradict themselves. E.g. Brief, p. 57; Pet. for Cert., p. 18.

is relevant to the educational process; and (2) absent a hearing impariment, each child has an opportunity to understand 100 percent of what is presented. The deficiency in Amy's education is established by showing that she has an opportunity to decode less than 100 percent of the material presented orally because of her deafness.[19] That is not

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[19] By definition, equal is a word of comparison. To illustrate, Amy must be compared with a hypothetical student, possessed of all her intellectual and other qualities, but possessed of hearing necessary to provide him with the opportunity to understand 100 percent of communications.

I - Intelligence.
E - Energy.
N - Initiative.
A - Intellectual assertiveness.
C - Opportunity to comprehend oral communications.

Hypothetical Student		Amy Rowley
I x E x N x A x C	=	I x E x N x A x C-41

The I, E, N, and A cancel each other out. To make the equation equal, and provide the students with equal educational opportunities, either

30 years ago. [20]

Even assuming, arguendo, that the petitioners are correct and the standard for FAPE envisioned by Congress is unworkable, it is their place to go back to Congress to have that standard revised. The judicial branch of government interprets laws, it does not write them. Diamond v. Chakrabarty, 447 U.S. 303, 100 S. Ct. 2204, 2210-2211 (1980); United States v. Rutherford, 442 U.S. 554, 99 S. Ct. 2470, 2477 (1979); Tennessee Valley Authority v. Hill, 437 U.S. 153, 189-193, 98 S. Ct. 2279 (1978). [21]

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[20] Defective hearing in children tends "to prevent them from receiving the full benefit of school work." New York Education Law, section 904.

[21] During 1981, Congress had been asked to repeal the Act and include the education of the handicapped program within an omnibus educational block grant program (S. 1103, H.R. 3645); it declined to do so. Congress had been asked to reduce authorizations under the Act; it increased those authorizations (Public Law 97-35). Congress had been asked to reduce appropriations under the Act; it increased those appropriations (Public Law 97-92).

a radical idea; the New York State Legislature recognized precisely that more than

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Amy's access to oral communications must be increased by 41 percent or the hypothetical student's comprehension of oral communications must be decreased by 41 percent.

In Amy's case, the 41 percent shortfall in the ability to comprehend oral communications is proven administering to her a test to determine how much she misses because of her deafness. Amy was administered by the Utley Lipreading Test. (J.A. 184; Pl. Ex. No. 12, R.T. 109, R.E. 9-10; Pet. for Cert., App. C-7-8, reprinted 483 F. Supp. 528, 532). Dr. Mulholland, the petitioners' witness, confirmed that the Utley test is an "excellent test and has good validation, good reliability . . ." (R.T. 384-385).

As shown above, there is no need to evaluate the potential of any, let alone every, child in a school district. The petitioners have created a straw man in their assertions that Judge Broderick's Opinion requires them to evaluate the potential of every child. However, it should be noted that Judge Broderick did not formulate the concept of potential post-trial (Pet. for Cert., Reply Brief, page 7). At the trial, Judge Broderick asked Dr. Mulholland: "Has there been any test developed . . . which has the purpose of indicating the potential that a deaf child may have?" R.T. 383. Dr. Mulholland proceded to answer that precise question over the next seven pages of the Transcript.

Equal educational opportunity is an input standard. The school need only provide a handicapped child with the services needed to respond to the unique needs occasioned by his disability in order to provide that child with the same opportunity as other children to benefit from whatever it is the school has to offer. See Haggerty and Sacks, Education of the Handicapped, Towards a Definition of Appropriate Education, 50 Temple Law Quarterly, 961, 972-973 (1977). The Act envisions no specific end result (the school is not held accountable for the achievement of the maximum potential of the handicapped child, nor could any reasonable reading of Judge Broderick's

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The petitioners are asking this Court to do precisely what Congress refused to do: convert this categorical program into a block grant program.

Opinion lead to that conclusion). Judge Broderick's standard is an input standard, derived from the respondents' (plaintiffs') post-trial reply brief, pp. 5-6. That his standard has been so interpreted is made clear by this excerpt:

> The nonhandicapped child in the Springdale elementary system is provided the opportunity to learn language skills, reading, writing, arithmetic, social studies and science. The school provides the nonhandicapped child an opportunity to learn the basics and to learn them well enough that he might excel in his secondary school courses. But the Springdale school does not turn every one of its students into academicians or professionals, or even successful secondary school students. The home life of the child, his parents' interests and the child's cultural and sociological environment often determine the child's academic success and attainment or lack of such.

Springdale School District v. Grace, 494 F. Supp. 266, 272 (WDArk, 1980); aff'd. 656 F.2d 300, (Eighth Circuit, 1981). See, also, Espino v. Besteiro, 520 F. Supp. 905 (SDTex, 1981); Bales v. Clark, 523 F. Supp. 1366, 1370 (EDVa., 1981).

That the petitioners are fully aware of that is evidenced by this excerpt from the oral argument before the court of appeals:

> JUDGE BONSAL: The potential of unhandicapped children is completely different, too, isn't it? I mean it seems to me what you are talking about here is giving the handicapped child no further -- I don't know whether potential comes into it -- but the handicapped child should have equal opportunity with unhandicapped children to receive whatever it is the school can offer.
>
> MR. SHERMAN: I think that is true. There is no requirement that nonhandicapped children be provided an education that will maximize their potential.
>
> JUDGE BONSAL: No. I think that is it. If they got the equal opportunity, then from there on it is up to them.

J.A. 350-351.

It may be that "equal educational opportunity" means providing identical services and equipment to all children,

irrespective of disability. [22] But that would amount to a specific repudiation

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[22] This Court has found that equal educational opportunity is not shown "even though the physical facilities and other 'tangible' factors may be equal . . ." Brown v. Board of Education, 347 U.S. 483, 74 S. Ct. 686 (1954).

In Lau v. Nichols, 483 F. 2d 791, 806 (Ninth Circuit, 1973), Judge Hufstedler (dissenting) declared that "equal treatment of unequals" does not satisfy the demands of equal protection. This Court, in reversing the Ninth Circuit and adopting Judge Hufstedler's dissenting views, declared: ". . . there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." Lau v. Nichols, 414 U.S. 563, 566, 94 S. Ct. 786 (1974).

of Congress' directive that special education and related services provide for the "unique needs" [23] of handicapped children. 20 U.S.C. 1401 (17 and 18). The fact that the petitioners have provided Amy with services, no matter how ineffective, shows that even they do not interpret "equal educational opportunity" in that manner (J.A. 332-333).[24]

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[23] Amy's unique needs are obvious; she needs to have oral communications presented to her other than orally. Because of deficiencies in her comprehension of oral communications, Amy has significantly less chance to succeed as a student than a similarly situated student who is not deaf -- unless she is provided with the opportunity to understand the same oral communications presented to that similarly situate student. That is just common sense; you build on a child's strengths, not on a child's weaknesses.

[24] The petitioners appear to have abandoned their contention that the Act does not include provision for the use of sign language interpreters, nevertheless, it should be noted that the Act includes the use of reader services and braille texts, 121 Congressional Record H 23707, July 21, 1975 (remarks of Rep. Quie),

Citing the decision in Pennsylvania Association for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (EDPa, 1971) and 343 F. Supp. 279 (1972), the petitioners and their amicus appear to suggest that the purpose of the Act is to place handicapped children who are not receiving any education into the public schools so they can take up space. That decision does not, in any way, stand for that proposition. Furthermore, that is not education -- education is providing children with effective programs. Dr. Edward W. Martin, Director of the Office of Education of the Handicapped, Department of Health, Education, and Welfare. Hearings Before the Senate Committee on Labor and Public Welfare, June 17

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although nowhere is that stated explicitly in the Act or the regulations promulgated thereunder.

and 24, 1974, p. 1786. Dr. Martin's views were echoed by all individuals who addressed the subject in testimony before the Senate Committee. Clearly, the Act is intended to assist handicapped children who are receiving an inappropriate education. 20 U.S.C. 1400(3), 1412(2)(C).

The petitioners urge that the goal of the Act is to develop a handicapped child's self-sufficiency.[25] That may very well be, but it has nothing to do with this controversy. As heretofore noted, note 12, supra, the Act envisions different goals for different children. Self-sufficiency very likely is the educational goal for children who suffer from mental

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[25] By so arguing, the petitioners acknowledge that the definition in the Act is not a usable one.

or emotional disabilities. Self-sufficiency could not be the goal for Amy; if she never set foot in school, she would be self-sufficient when she grew up. As the term "self-sufficient" is defined and commonly understood, she could, without any contribution from the HHCSD, wash, feed herself, go to the bathroom, etc. Presumably, that is true of every child who suffers from a physical, rather than a mental or emotional, disability. [26] If self-sufficiency is the only goal envisioned by the Act for every handicapped child, then the Act is a

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[26] Of course, there are situations where a child with a physical disability will not be able to perform one or more of those manual operations because of the limitations imposed on him by that disability (e.g., a child with spina bifuda cannot go to the bathroom).

nullity for more than half of the children the Act itself defines as coming under its umbrella. 20 U.S.C. 1401 (1). Courts shall not interpret Congressional statutory language in such a manner as to render it meaningless and ineffective. United States v. Menasche, 348 U.S. 528, 538-539, 75 S. Ct. 513 (1955); Bird v. United States, 187 U.S. 118, 124, 23 S. Ct. 42 (1902); Federal Trade Commission v. Retail Credit Co., 515 F. 2d 988, 994-995 (D.C. Circuit, 1975).

In her concurring and dissenting opinion in Battle v. Pennsylvania, 629 F. 2d 269 (Third Circuit, 1980), Judge Sloviter states precisely that: "This goal [self-sufficiency] . . . appears to be the generally accepted educational objective for severely retarded and emotionally disturbed

children." (page 285). The majority in that opinion noted: "We think it would be unwise to declare in advance that all educational policies predicated on other reasonably conceived goals are invalid. Each such policy deserves the benefit of a full examination for compliance with the Act by this court, especially in light of a legislative history which we do not believe clearly defines any single ultimate goal." Id. at 279, note 11. In Armstrong v. Kline, 476 F. Supp. 583 (EDPa, 1979): "By enunciating this standard [self-sufficiency], the Court does not mean to imply that it is the only one that is used to evaluate whether a program is 'appropriate' and meets the 'unique needs' of the handicapped child. Of course, Congress may have had other goals that it wished

the educational program to satisfy (including allowing the handicap (sic) child access to the programs available to non-handicapped students) . . ." (Page 604, note 8). [27]

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27 "Handicapped individuals have a normal probability of being creative and talented." Sen. Rep. No. 94-168, p. 12, reprinted in Cong. and Adm. News, 1975, p. 1425, 1436. The purpose of the Act is to provide handicapped children with the educations that will offer them the opportunity to live "meaningful lives." Id. at p. 9. There are deaf individuals who are chemists (Mr. Rowley, for example), engineers, microbiologists, lawyers, doctors, etc. Indeed, the only position that a properly educated deaf individual could not qualify for would be that of telephone operator.

Senator Javits stated that: "[H]andicapped youth have minds and ambitions, too. One of them became President of the United States and remained President for an unprecedented four terms. There have been other highly significant examples, although we do not need any better example than that of F.D.R., Sr., as to overcoming a handicap." Later, Senator Javits spoke of Thomas Edison (who was deaf) as well. 121 Congressional Record S 19494, June 18, 1975 and S 37416, November 19, 1975. Certainly, Franklin Roosevelt and Thomas Edison did something more than attain self-sufficiency.

Relying upon 20 U.S.C. 1401(18)(B), the petitioners argue that each State shall define the term FAPE. That is still another novel theory, totally at odds with the petition for certiorari,

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Senator Beall spoke of the contributions handicapped children can make to society (id. at 19505).

Representative Biaggi stated that failure to provide handicapped children with FAPEs will waste the "talents" of those children. "Every child has a right, regardless of handicap, to realize his fullest potential, no matter how great or how small." 121 Congressional Record H 23709, July 21, 1975.

"The time has come to reject the false notion that persons with disabilities are sole cases for charitable action. This legislation will assure that all handicapped persons are granted the opportunity to make the valuable and significant contributions of which they are capable, to our society." (id. at 23709) (remarks of Rep. Minish).

pages 19-20. [28] If the ultimate determination of the meaning of FAPE is left to the entities whose failures (20 U.S.C. 1400 (b)(2-6)) were the reason for enactment of the 1975 Act, then we fan expect more of the complacent nonperformance of the past. The provision cited by the petitioners stands for the proposition that the States shall have authority to implement, not define, the provision of a FAPE. See Battle v. Pennsylvania,

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[28] "The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or the Court of Appeals, we will not consider it." Miree v. DeKalb County Georgia, 433 U.S. 25, 33-34, 97 S. Ct. 2490 (1977). See also, Duignan v. United States, 274 U.S. 195, 200, 47 S. Ct. 566 (1927); United States v. Lovasco, 431 U.S. 783, 788 note 1, 97 S. Ct. 2044 (1977); Lawn v. United States, 355 U.S. 339, 362, note 16, 78 S. Ct. 311 (1958).

629 F. 2d 269, 284 (Third Circuit, 1980) (Judge Sloviter, concurring and dissenting); cert. denied sub. nom., Scanlon v. Battle, U.S. , 101 S. Ct. 3123 (June 22, 198).[29]

C. A Federal judge may grant all appropriate relief in order to provide a handicapped child with a FAPE.

The petitioners argue that handicapped children to not have a right to a FAPE. That is yet another new theory, not raised in the courts below.

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[29] Judge Broderick's order does not require the petitioners to hire an interpreter; it requires the petitioners to place an interpreter in Amy's classroom to interpret for her. Implementation of that order is left to the petitioners (J.A. 384-386).

State standards cover such diverse matters as discipline; certification of teachers; size of classes; and the prerequisites for the granting of diplomas.

> For purposes of appellate review, "may [an appellant] now completely change his theory upon review and so seek in this court a reversal on the ground that admiralty law controlled adjudication. . . 'The theory upon which the case was submitted and argued in the district court cannot, when an adverse judgment results, be discarded and a new, contradictory theory be substituted and successfully invoked on appeal'". Holm v. American Shipbuilding Company, 275 F. 2d 201, 202-203 (Sixth Circuit, 1969).

The Act requires each State wishing to participate in the program to enact legislation to assure that each handicapped child within that State will have a right to a FAPE, as defined in the 1975 Act. 20 U.S.C. 1412(1); S. Rep. No. 94-168, p. 10, reprinted in Cong. and Adm. News, 1975, p. 1425; Helping Children With Handicapping Conditions in New York State, p. 20. It suffices to note that the New York State Plan provides that: "All

school-age children have an absolute right to a free, appropriate education." id. at 237. [30]

The petitioners concede that the New York State Plan, drafted pursuant to 20 U.S.C. 1413, and the Regulations of the Commissioner of Education of the State of New York are broad enough to encompass the provision of a sign language interpreter for a deaf child.[31] They argue, however, that the only

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[30] See also, Your Child's Right to an Education, A Guide for Parents of Handicapped Children in New York State, p. 1 ("As a parent or legal guardian in New York State, you should be informed about special education services and the right of all children to an education appropriate to their needs.").

[31] J.A. 335-337, 358-359. Nevertheless, the petitioner HHCSD contends that it will not even consider the placement of an interpreter in Amy's classroom unless she fails academically (e.g. J.A. 328). Inasmuch as Amy and her parents will never permit her failure (see pages 14-15, supra), HHCSD will never consider the placement of an interpreter in her classroom.

remedy for parents dissatisfied with the failure of their child's IEP to contain provision for a service concededly encompassed within the provisions of a State Plan is to attend public hearings of a State advisory council pursuant to 20 U.S.C. 1412(7). The decision of this court in Cannon v. University of Chicago, 441 U.S. 677, 99 S. Ct. 1946 (1979), makes clear that an individual will not be provided with "remedies" that leave him effectively remediless. However, there is no need to rely upon the Cannon decision, supra, or upon the decision in Cort v. Ash, 422 U.S. 66, 95 S. Ct. 2080 (1975), inasmuch as the Act contains provisions for a private right of action. [32]

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[32] A district judge shall review the administrative records, hear additional evidence at the request of a party, make an independent decision, based upon the preponderance of the evidence,

The petitioners contend that 20 U.S.C. 1415(e)(2) enables parents to invoke the Act's procedural safeguards only.[33] By the terms of section 1415, it is available to handicapped children and their parents "with respect to the provision of a free appropriate public education." Senator Williams elaborated on that language:

> [T]he language referring to "free appropriate public education" has been adopted to make clear that a complaint may involve matters such as questions respecting a child's individualized education program, questions of whether special education and related services are being provided without charge to

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and grant all appropriate relief. 20 U.S.C. 1415 (e)(2) and S. Conf. Rep. No. 94-455, p. 50, reprinted in Cong. & Adm. News, 1975, p. 1480, 1503. The petitioners agreed to adopt the procedures set forth in 20 U.S.C. 1415(e)(2), 20 U.S.C. 1412(5)(A), 1414(a)(7); 34 CFR 300.131, 237.

[33] That is yet another new and novel argument. In their petition for certiorari, the petitioners concede that a court has the authority "to determine whether the local district is providing a free appropriate public education." (page 31).

> the parents or guardians, questions relating to whether the services provided a child meet the standards of the State educational agency, or any other question within the scope of the definition of "free appropriate public education."
> 121 Congressional Record S. 37415, November 19, 1975.

The petitioners concede that an impartial hearing officer or a State Commissioner of Education may revise a handicapped child's IEP when the facts so require (Pet. for Cert., reply brief, pp. 10-11). A judge's authority under 20 U.S.C. 1415(e)(2) is at least as extensive as that of an impartial hearing officer or a State Commissioner of Education. [34]

Before the court of appeals, the petitioners conceded that Judge Broderick had authority to issue the order under review (J.A. 359-361).

[34] Judge Broderick indicated, quite appropriately the respondents believe, that his order of December 28, 1979 requires the

If a Federal jduge determines that an IEP fails to provide the child in question with a FAPE he can, under his authority to grant all appropriate relief, order that that IEP be revised to provide that child with a FAPE.

D. Under the Act, the parents of a handicapped child have an important role in the development of their child's educational program.

Each local public educational agency (such as HHCSD) must prepare an IEP for each handicapped child within its jurisdiction. 20 U.S.C. 1414(a)(5), 34 CFR 300.340 et seq., 130, 235. An IEP is to

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revision of Amy's IEP, but that he would not issue an order mandating compliance with an existing order while the matter is before this Court. Thus, the petitioners' only purpose in bringing this case before this Court is to work a stay specifically denied by the Federal Rules of Civil Procedure and specifically denied by the court of appeals.

to be written by a handicapped child's teacher, school personnel, his parents or guardian, and, whenever appropriate, the child himself. Among other things, the program must set forth the specific services to be provided to that child and the extent to which that child will be able to participate in regular educational programs. 20 U.S.C. 1401(19).

Active parental participation, through the IEP, is an important feature written into the 1975 Act; preparation of the IEP is a joint effort.

> The conferees have defined the individualized education program as a written statement . . . jointly developed by the local educational agency, the teacher, the parents, and the child, whenever appropriate. It is intended that all parties (the local educational agency, the teacher, the parents, and the child, whenever appropriate) will be involved throughout the process of establishment, review and revision of this program. (Emphasis supplied).

S. Conf. Rep. 94-455, p. 39, reprinted in Cong. and Adm. News, 1975, p. 1480, 1492. [35]

Nevertheless, Mr. and Mrs. Rowley were provided no opportunity to develop Amy's IEP or to provide input into the development of that program (J.A. 168-169). [36]

E. The contents of a handicapped child's IEP shall be based upon that child's individual needs.

Judge Broderick reviewed all the evidence, including the administrative records and the testimony of witnesses

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[35] Mr. Chatoff: Are you saying that parents and schools have to work together?

Mr. Denis: Absolutely. There is no better way.

J.A. 220.

[36] This is not a class action; it is a private action involving Amy and only Amy. E.g., J.A. 380-381; R. 37, plaintiffs' post-trial argument, pp. 6-7.

at the trial of September 26, 27, 28, and October 4, 1979, and ordered that Amy's IEP be revised to provide her with the services necessitated by her unique needs resulting from her deafness. Judge Broderick's order fulfills the requirements of the Regulations of the Commissioner of Education that services to handicapped children shall be individualized. [37]

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[37] Commissioner of Education of the State of New York, Gordon M. Ambach: ". . . [S]ervices to children in need of special education should be based on individual need, rather than on categorical classifications." Oversight Hearings on the Education for All Handicapped Act of 1975 Before the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resources, July 9, 26, and 31, and October 1, 3, 10, 1979, p. 1012, 1014.

"The formation of resource programs as instructional service options shall depend upon the nature of the child's capabilities and individual needs." Regulations of the New York State Commissioner of Education, section 200.4(c)(1).

"Unless the student's handicapping condition requires special classes, the student shall be educated in regular classes with appropriate supportive supplementary assistance." Id., section 200.4(a)(2).

By contrast, the petitioners furnished Amy with the services they determined to be the minimum necessary for any deaf child. See Pet. for Cert., App. K1. They did so upon being advised ". . . that all the State requires for a deaf child is that we provide one hour a day of individualized instruction from a teacher of the deaf. . ." (J.A. 326; Pl. Ex. 23, R.T. 325). The petitioners refused to acknowledge that section 200.4(d)(4) is modified by 200.4(c)(1) in order to provide individualization. [38]

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[38] Although the petitioners clearly did not comply with the Regulations of the Commissioner of Education, at no time did they present a motion to dismiss because of their alleged compliance with those Regulations. Prior to filing an answer, the petitioner school district filed a motion pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. The school district alleged compliance with a particular Regulation, solely for the purpose of showing

The petitioners question Judge Broderick's consideration of respondents'

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that the Commissioner was a necessary party defendant. Had the school district sought dismissal on the ground that it had complied with all applicable Regulations, it would have moved under Rule 12(b)(6); however, as the respondents' affirmation in opposition shows, that specifically was not done, because that would have resulted in an immediate hearing on the merits, whereas the petitioner school district sought to delay consideration of the merits for as long as possible.

The petitioners complain because Judge Broderick did not issue an Opinion when he denied the HHCSD motion to dismiss. Pursuant to Federal Rules of Civil Procedure, Rule 52(a), no such Opinion is necessary. The memorandum of law accompanying that motion (R. 10) argues, inter alia, that the plaintiffs must assert that the amount in controversy exceeds $10,000 in order to confer jurisdiction under 28 U.S.C. 1343 and urges reliance upon the pre-1966 version of FRCP, Rule 19.

Part 200 of the Regulations of the Commissioner of Education will be repealed and replaced effective July 1, 1982. After July 1, there will be no Regulation comparable to existing section 200.4(d)(4). Any school district in New York could implement all of the provisions of such revision during school year 1981-82; it is not known by the respondents if the petitioner school district elected to do so.

expert testimony. [39] A Federal judge is called upon to hear and decide controversies covering the entire spectrum of human activity. No judge, not anyone, can be so well versed that he is able to render judicious decisions on all matters before him without the presentation of expert testimony to acquaint him with the field in which he is called upon to decide. [40] The respondents called five experts for

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[39] The petitioners have themselves recognized the importance of expert testimony (e.g., brief, pp. 79, 95).

[40] ". . . [I]t it the very purpose of expert testimony to assist the trier of facts (in this case, a court sitting without a jury) to understand, evaluate and decide the complex evidential materials in the case." United States v. R.J. Reynolds Tobacco Co., 416 F. Supp. 313, 315 (DNJ, 1976).

that purpose -- four of whom had and have personal knowledge of Amy Rowley. [41]

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[41] Mrs. Rowley, Amy's natural mother, is a certified teacher of the deaf with more than six years experience. She testified to and submitted documentary material on her observation of Amy in her classroom over a one week period (J.A. 91-98).

Mr. Taras B. Denis has known Amy since infancy (J.A. 220-222). Mr. Denis is an Administrator at the New York School for the Deaf in White Plains.

Dr. A. Barbara Kligerman has tested Amy's hearing since May 1974 (J.A. 102-108). Dr. Kligerman is the Director of the Speech and Hearing Clinic of the Westchester County Medical Center.

Dr. Martin L.A. Sternberg spent several hours with Amy during the spring of 1979 to gauge her communication skills (J.A. 159-160, 215-216). Dr. Sternberg is a Professor at the New York University Deafness Research and Training Center.

Among the expert witnesses testifying for the respondents, only Dr. Donald F. Moores, the Head of the Division of Special Education and Communication Facilities at the Pennsylvania State University and a nationally recognized authority on the education of deaf children, testified on the general field of deaf education, without any personal knowledge of Amy Rowley.

The petitioners called three experts for that purpose.[42] In addition, Judge Broderick received two parent initiated independent educational evaluations (20 U.S.C. 1415(b)(1)(A) and 34 CFR 300.503(c)) prepared by two experts in the education of Deaf children and submitted to the Commissioner of Education.[43]

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[42] The petitioners place a great deal of weight on the fact that Amy did not attend to Mr. Cortez when Dr. Doctor and Mr. Cortez spoke with her after their visit to her school two days before the commencement of the trial. It would have been truly amazing if she had paid any attention at all to Mr. Cortez. Dr. Doctor and Mr. Cortez met with Amy for ten minutes (J.A. 235-236). Mr. Cortez signed to Amy for part of that ten minute discussion (J.A. 236). However, Mr. Cortez is not an interpreter; nor is he proficient in sign language (J.A. 236).

[43] Who is the preeminent expert on Amy Rowley's needs? Her mother, deaf herself, and a certified and experienced teacher of the deaf who has lived with Amy's deafness every day of Amy's life -- or an "expert up in Albany" (R.T. 10) who has never met Amy? Who knows more about Amy's unique needs, Mr. Denis, Dr. Sternberg, and the two experts in the education of deaf children who conducted individual educational evaluations of Amy or that illusory "expert

The statement on page 13 of the Pet. for Cert., Reply Brief, that the Commissioner raised the issue of cost in his brief to the Court of Appeals merely confirms the respondents' assertion that cost to the HHCSD had not been raised in the lower courts. The Commissioner asserted cost considerations relative to the provision of the "best possible"

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up in Albany"? Who knows more about the shortfall in Amy's comprehension resulting from her deafness, Dr. Kligerman, who has tested Amy periodically and regularly since 1974, or an audiologist reviewing the charts prepared by Dr. Kligerman when she administered those tests? Or maybe, instead of the "expert up in Albany," the real expert is Ms. Amy Toole, whose contribution to the matter was to advise the petitioner HHCSD on what she believed was the minimum service the school district could get away with (J.A. 326). Or perhaps the real experts are the employees of the HHCSD who have no educational backgrounds or experience in the education of deaf children. People like Dr. Zavarella, Ms. Pappas, Dr. Binder, and Ms. Globerman?

(optimal) education to handicapped children. Judge Broderick specifically rejected that standard. As Judge Broderick stated, "appropriate" can mean "adequate," "appropriate," or "optimal." The petitioners have never raised the issue of cost relative to an "appropriate" education nor have they offered any evidence that even obliquely impacts on cost relative to an appropriate education.

As previously noted, at the final pre-trial conference the attorney for the petitioner school district declared that "cost is not an issue in this case." "Attorneys at a pre-trial conference owe a duty to the court and opposing counsel to make a full and fair disclosure of their views as to what the real issues at the trial will be." Cherney v. Holmes,

185 F. 2d 718, 721 (Seventh Circuit, 1950). See also, United States v. Maryland and Virginia Milk Producers Association, 22 F.R.D. 300, 302 (DC, 1958). The respondents relied on that assertion. See App. II. [44]

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[44] If the petitioners really believe that cost is an issue, and not merely a divertisement, they should have raised it three and a half years ago -- then there would be something on the Record for this Court to review. "For a government agency best familiar with its own practice with respect to a matter directly in issue, and now said to be of paramount importance, to make no mention of the subject matter until after it had lost the case on another ground, if deliberate, is a breach of duty to the court and, if inadvertent, is still inexcusable. . ." Carr v. Federal Trade Commission, 302 F. 2d 688, 692 (First Circuit, 1962).

POINT II

RESPONDENTS EXHAUSTED ALL ADMINISTRATIVE REMEDIES PRIOR TO INITIATING SUIT.

The petitioners concede that the respondents exhausted all administrative remedies and that the district court had jurisdiction to review Amy's educational program for school year 1978-79.[45] However, they argue that upon the completion

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[45] Administrative and judicial review would not be precluded if the petitioners would comply with the issued order (see note 10, supra).

At no prior stage in the proceedings has the petitioner HHCSD contested the jurisdiction of the district court. Indeed, at the commencement of the hearing in this case, the attorney for the HHCSD stated:

> It makes little sense to me to have to go back, to go through the Committee hearings -- well the Committee has already made its determination -- to go through the independent hearing officer, to go through the review of the Commissioner when basically the facts haven't changed. That is a conclusion, and again, that is some-

of school year 1978-79, the matter became moot and that the court could not have jurisdiction under 20 U.S.C. 1415(e)(2) for school year 1979-80 until all administrative procedures set forth in section 1415 had been completed with respect to Amy's IEP for school year 1979-80. Inasmuch as the matter would not then be ripe for judicial review until after the end of school year 1979-80, by that time the matter would again be moot and it would be necessary to start

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> thing that your Honor will have to determine as a result of this hearing. But it is my feeling that the facts haven't changed substantially. (R.T. 17).

During the oral argument before the court of appeals, the attorney for the school board conceded that the district court had jurisdiction to grant the relief requested and granted (J.A. 359-362).

again during school year 1980-81, ad infinitum.[46] In essence, the petitioners argue that the procedural safeguards established to protect the rights of parents of handicapped children, which culminate in judicial review, effectively preclude such review.

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46 The respondents did not delay consideration of the controversy for even one day; they have continually objected to the delaying tactics of the petitioners (e.g., R. 6; R. T. 10, 21; J.A. 59-62). However, assuming, arguendo, that the petitioners had been paragons of rectitude, this matter would still be moot according to their reasoning. On June 18, 1979, had the school district filed an answer and, on that same day had Judge Broderick reviewed the administrative records and issued an order requiring placement of an interpreter in Amy's classroom for one or two days remaining in school year 1978-79, the petitioners would have appealed, thereby staying implementation of the order. At the end of the school year (one or two days after issuance of the order), the matter would be moot. The moot order

It is hornbook law that courts shall not interpret Congressional statutory language in such a manner as to render it meaningless and ineffective. United States v. Menasche, 348 U.S. 528, 538-539, 75 S.Ct. 513 (1955); Bird v. United States, 187 U.S. 118, 124, 23 S.Ct. 42 (1902); Federal Trade Commission v. Manager, Retail Credit Co., Miami Branch Office, 515 F.2d 988, 994-995 (District of Columbia Circuit, 1975).

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would never be implemented and would never be subject to judicial review.

Amy Rowley is deaf; barring the discovery by medical science of a cure for deafness, she will be deaf for the rest of her life. Her parents will object to any arrangement, in any school year, that fails to provide her with the service necessary to enable her to understand what is said in her classroom, despite her deafness. Thus, administrative procedures and judicial review in any school year would involve consideration of the exact same question: What service must Amy receive to compensate for her deafness?

Were the argument of the petitioners to be adopted, no court would ever be able to review Amy's IEP for any school year. Where jurisdiction exists, as it does here, it does not

terminate when there is a likelihood that the same situation will be repeated again in the future. The well recognized exception to the mootness doctrine, as enunciated by this Court, assures that an aggrieved individual will be entitled to his day in court. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 514-515, 31 S.Ct. 279 (1911); Nebraska Press Association v. Stuart, 427 U.S. 539, 546, 96 S. Ct. 2791 (1976); Roe v. Wade, 410 U.S. 113, 123-125, 93 S.Ct. 705 (1973).

The Act, 20 U.S.C. 1415(e)(2), grants jurisdiction to Federal district courts with respect to the original complaint filed thereunder "and all matters relating thereto" (Senate Conf. Rep. No. 94-455, page 50, reprinted in

Cong. and Adm. News, 1975, page 1503; and 121 Congressional Record S 37416, November 19, 1975 (remarks of Sen. Williams)), and to grant any appropriate relief. By the passage of the 1975 Act, Congress sought to assure that the parents of disabled children would not have to go to court continually to protect the rights of their children, not that those parents would be denied access entirely to the courts of this country. Senate Report No. 94-168, page 9, reprinted in Cong. and Adm. News, 1975, page 1433 (e.g., Selelyo v. Drury, 508 F. Supp. 122, 126-128 (S.D.Ohio, 1980)).

Even assuming, arguendo, the correctness of the argument of the petitioners, it is a recognized

principle of law that a party need not exhaust administrative remedies when such action would be futile. See, for example, Porter County Chapter of the Izaak Walton League of America, Inc. v. Costle, 571 F.2d 359, 363 (Seventh Circuit, 1978). During the Senate Floor debate on the conference report on S. 6 of the 94th Congress, the Education for All Handicapped Children Act of 1975, Senator Williams, the Floor Manager, said:

> I want to underscore that the exhaustion of administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter . . .
> 121 Congressional Record S 37416, November 19, 1975.

Because a child continually grows and matures, delay will serve only to frustrate the purposes of the Act -- to provide handicapped children with appropriate services.[47] Nevertheless, the petitioners argue that the

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47 ". . . [D]elay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development. . . [I]t is expected that all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with fair consideration of the issues involved." 121 Congressional Record S 37416, November 19, 1975 (remarks of Sen. Williams). See also, id. at 37410-411 and 121 Congressional Record S. 19482, June 18, 1975 (remarks of Sen. Randolph).

office of the Commissioner must be given a second chance "to correct its own mistakes" (petitioners' brief at p. 96)[48] at the expense of the educational opportunity of a child not responsible for those mistakes. The short answer is that remand is a matter within the discretion of the trial judge in his consideration of "appropriate relief," including consideration of such matters as delay, the futility fo such action, and the possibility and probability that such remand would serve only to permit the state educational agency to cover up those mistakes (see note 12, supra).

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[48] Much of the Commissioner's independent decision is copies from the decision he was supposed to review (R. A. 343-345).

POINT III

THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The judges of the court of appeals acted in accordance with their responsibilities under Canon 3(A)(5) of the Code of Judicial Conduct.

More than 60 years ago, at a time when the calendars of the courts of appeals were not nearly as crowded as they are today, this court declared that a court of appeals acted properly when it handed down a decision without any opinion at all. Texas and P.R. Co. v. Hill, 237 U.S. 208, 215, 35 S.Ct. 575 (1915).

At the oral argument before the court of appeals, the petitioners conceded that:

1. they must provide Amy Rowley with a FAPE (J.A. 332);

2. they must provide Amy Rowley with an equal educational opportunity (J.A. 346, 350-351);

3. the New York State Plan and the Regulations of the New York State Commissioner of Education encompass the provision of a sign language interpreter for a deaf child when that service is found necessary to provide that child with a FAPE (J.A. 335-337, 358);

4. the respondents (plaintiffs) were entitled to seek and Judge Broderick had authority to grant a mandatory injunction (J.A. 359-361); and

5. they did not disagree with the standard set forth by Judge Broderick (J.A. 354).

The petitioners asserted that their case depended upon the evidence (J.A. 362), thereby acknowledging that this case presented only a question of fact. The overwhelming evidence presented by the respondents could lead to only one result.

Judge Broderick weighed and evaluated the evidence with great care (Pet. for Cert., A-7; 632 F.2d 945, 948); the court of appeals reviewed the record carefully (Pet. for Cert., App. A-5; 632 F.2d 945, 947).[49]

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[49] "The policy underlying the 'two-court' rule is obvious. This court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force . . ." Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 636, 87 S. Ct. 666, 17 L.Ed.2d 656 (1967). See also, Workman v. Mayor, Etc., City of New York, 179 U.S. 552, 21 S.Ct. 212, 45 L.Ed. 314 (1900); International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, note 7, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979). The rule is of even greater importance in this case because four of the witnesses for the respondents who are deaf, including Mr. and Mrs. Rowley, testified using total communication, which is visual in nature. Per force, Judge Broderick, and only Judge Broderick, was able to assimilate that testimony.

The statement that the decision is based upon "the unique facts" of this case is merely a restatement of the intent of the Act: that each case shall be decided on the "unique needs" of each child.

At page 104, the petitioners concede that the decision of the court of appeals does justice in the case of Amy Rowley. Even assuming, arguendo, some merit to any of the petitioners' newly discovered theories, the decision of a lower court shall not be disturbed if it is consistent with "substantial justice" and the "substantial rights of the parties." Rule 61, Federal Rules of Civil Procedure. See also, 28 U.S.C. 2111; Land O' Lakes Creameries, Inc. v. Commodity Credit Corporation, 308 F.2d 611 (Eighth Circuit, 1962). ("[I]f there was any error committed

by the District Court in its statement of Conclusion of Law No. VI supra it could be no more than harmless error and such error would not warrant reversal of the judgment in this case."); Carpenters District Council of Denver and Vicinity v. Brady Corporation. 513 F. 2d 1, 4 (Tenth Circuit, 1975).

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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